

Constitutional Justices have feelings too, you know

Maximilian Steinbeis

2011-09-25T15:32:24

[Susanne Baer](#), the newest member of the Federal Constitutional Court, appointed in November 2010, has been long enough in office to know all about the ways and mores of that venerable institution, but not long enough to lose her scientist's disposition to ponder and wonder how this thing actually works, as well as her refreshing openness about sharing her thoughts and feelings.

Yesterday I heard her speaking at a [conference](#) on "Constitutional Courts and their Role in Political Transformation Processes" at Humboldt-University here in Berlin. Her topic was "the daily life experience at the court" – a number of unsystematic, entirely personal perceptions and thoughts about how the court works at the inside, particularly how it handles the tricky question how far it can go.

Sensitive Beings

That, she said, is mostly a personal matter: The US-coined term "judicial restraint" does not apply in Germany, and the whole debate "suffers from the typical illness of transnational travelling theories". In Germany it's all about "justice's restraint", i.e. you have find out for yourself the limits of your role, and you do so by studying how your predecessors handled it. There are no rules how to do it, but there are "negative role models": Your colleagues will let you know that you don't want to become a second Mr. So-and-So and that it might be a good idea to avoid the example of Ms. Such-and-Such (she didn't mention any names at all, neither Evelyn Haas nor Paul Kirchhof nor any other that might spring to mind...), but other than that it's totally up to you where you draw the line.

A very strong and effective restraint mechanism is, according to Justice Baer, published opinion. It was very flattering for me to hear how anxiously the justices scrutinize the press clippings delivered to them every morning, searching for critique or praise of their decisions. (The clippings do not include online publications, though – a totally unpardonable omission, in my biased view). "I never read the paper as much as I do now", she said. Bad press really seems to get to them. "We do care a lot what people say. Very sensitive beings, those justices."

The same goes for academic criticism: The old days of constitutional court positivism are, according to Justice Baer, gone. There was a new "junior league of critique", that showed no hesitation at all to find fault with the court and its decisions and even relishes in that task, sometimes to the annoyance of the touchy justices: "The feeling is, they will find again we did wrong", Justice Baer complained and added the observation that some of that critique amounts to nothing more than claiming that "you are not smart enough, we would be smarter."

The bad thing about delivering final judgments on some of the most fiercely contested issues of the country is: You can't talk to anyone beforehand. "I am on my own. I am a totally lonesome cowgirl out there." You have to find your decision without talking it over with those you usually rely on. "For a gender study person – not a good idea. I love to talk to people. That is a heavy burden."

Sensitive beings, indeed...

Who Do You Restrain to?

Democracy is not an issue that gives Justice Baer a lot of worries with regard to judicial restraint: In an established democracy like Germany you can't play off democracy against the power of the court, she said, and to prove her point she quoted the "Wutbürger" phenomenon, the Swiss minaret initiative and the countless examples when democratic majorities failed to respect fundamental rights. "If I don't do it, who should do it?"

Who do you restrain to? That, according to Justice Baer, depends: Legislators have to get by with a lot less restraint than, say, ordinary judges. The court's job was to protect fundamental rights against "populism" acting out in democratically elected bodies like parliament, whereas with court decisions the FCC shows more leniency. That surprised some in the audience, who would have thought that democratically elected legislators deserve more restraint than non-elected judges, not less. But no: With legislators the FCC justices feel pushed to "be courageous, to do it!", whereas with judges they rather tend "to let them get away with it".

There was more harsh tidings for the legislative. Justice Baer is responsible in the First Senate for social security law and has thereby inherited the job of cleaning up after the messy Hartz IV reform. The much contested decision to send the legislators back to the drawing board to fix the existential minimum in a more coherent way was made without her participation, but if the issue returns to the FCC it is she who will draft the decision.

"There is not only a call for restraint, but also a risk of restraint", she summarized the experience from the view of the First Senate: The court had refrained from fixing the existential minimum himself and played the ball back to parliament. But "parliament took its time, to be polite." The time limit to fix the problem passed without result. The legislative proved unwilling to play along, and to that Ms. Baer reacted with anything but restraint: "We don't like that! We really like to play back the ball to parliament, but we really *hate* it if they don't take the ball. That's *awful*!"

Social security reform is passed by now, so that's spilled milk. But electoral reform, also demanded and several months overdue, isn't. That matter would go to the Second Senate, though. But that bench is no less sensitive than the other, I suppose...

"12 Years of Me Controlling Them"

Full of praise was Justice Baer's report about her experience of her own election process: The round of hearings in parliament she had to submit to was "one of the experiences in my life which was most interesting, I should say."

The former procedure of some very few secretive insiders to pick the candidates has been replaced by a more open and deliberative procedure. Now more MPs want to have a say, and legitimately so: "It's twelve years of me controlling them. That is an amazing amount of power. They want to know who sits there."

The hearings had been non-public, unlike in the US where the selection of a new justice to the Supreme Court makes national news for weeks and is frequently hotly debated. That was a good thing to Justice Baer: The interviews with the legislators had been "a separation of powers discussion of the finest kind. I was very impressed. There was a notion of shared responsibility." Had the hearings been broadcasted on TV, that could never have been the case.

One of the most important criteria for selecting a candidate was, according to Justice Baer, the courage and the standing of the person. "No MP wants a weak judge. That is the worst. That would be a total loser." They want a person that can hold up for twelve years. On the other hand he/she has to be socially competent and to fit in with the senate. You have to be able to engage in open discussions with your colleagues on the bench. "These people don't want a person who are convinced they already know." She herself had somewhat felt the prejudice that as a feminist she might be inclined to think she already knows, but at the end she had been able to convince the MPs of her affability.

Those extensive discussions among the justices set the FCC apart from the example of the US Supreme Court, whose members seldom argue much among themselves before they all write down their separate opinions. Many members of the FCC described those discussions as the most challenging and stimulating thing ever happened to them, and Justice Baer is no exception: "We do really work for the best argument out there", she said. "Everytime I am amazed about the variety of bright perspectives on a case." She considered herself "not dumb", but the sharpness and fastidiousness of her colleagues' minds filled her with awe: "You are put to the test the second you say something. You have to be really well informed, think about the consequences, know the precedents. Ideology is quickly out of the window."

